



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Interproperty Investments, Inc.

File: B-281600

Date: March 8, 1999

W. Blaine Early, III, Esq., Stites & Harbison, for the protester.
Gary W. Napier, Esq., and Jill Osborne Edwards, Esq., Napier, Reece & Associates, for Bimble, an intervenor.
John C. Ringhausen, Esq., General Services Administration, for the agency.
C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency advertised requirement for lease space in two local newspapers, as prescribed in General Service Administration regulations, and denies any deliberate attempt to exclude protester from competing, its failure to solicit incumbent lessor does not warrant sustaining protest, where agency otherwise obtained full and open competition and a reasonable price.

DECISION

Interproperty Investments, Inc. protests the award of a contract to Bimble under solicitation for offers (SFO) No. 7KY0036, issued by the Southeast Sunbelt Region of the General Services Administration (GSA). Interproperty asserts that the agency deliberately excluded Interproperty, the incumbent lessor, from the competition.

We deny the protest.

The protester currently leases some 13,000 square feet of office space to the Mine Safety and Health Administration (MSHA). In late 1996, the agency issued a SFO for a new lease (17,575 square feet), to which the protester responded; the agency subsequently canceled the solicitation because MSHA was undergoing a reorganization, which made its requirements uncertain. Letter from MSHA to Contracting Officer (Apr. 23, 1997). The protester did not object, in view of the agency's decision to extend the existing lease for another year, with two 1-year option periods. Affidavit of Gregory Parsons, Nov. 25, 1997, at 2.

In January 1998, MSHA submitted a new request to lease 17,035 square feet of office space in the Barbourville, Kentucky area. The agency placed advertisements in the February 5 Mountain Advocate, a local Barbourville paper, and in the Sunday, February 8 Cincinnati Enquirer, which circulates in northern Kentucky. The

advertisement requested responses by March 2, and, by that date, the agency had received five responses, offering nine sites. The incumbent did not respond. MSHA surveyed the sites and identified five of them as acceptable; MSHA also advised the agency that sites outside the city limits would be acceptable, as long as they were close to the city limits. Market Survey Summary, Apr. 13, 1997; Letter from Contracting Officer to Protester at 2 (Nov. 20, 1998) (response to Agency-level Protest).

The agency produced a mailing list including the five firms that had responded to the newspaper advertisements and issued them copies of the SFO, dated May 14, 1998. Although MSHA had approved the Bimble site, outside the Barbourville city limits, during its survey, the SFO stated that the area of consideration was limited to sites "[w]ithin the city limits of Barbourville, Kentucky." SFO § 1.2. The SFO, § 1.4, required that the space or site offered be located "not less than 150 feet and not more than 300 feet from a main thoroughfare" to ensure visibility by the local police, and advised offerors that, to eliminate any perception of a conflict of interest, the agency would accept no offers from coal companies or environmental groups.

By the June 30 closing date, all five firms had responded. The agency conducted negotiations and requested best and final offers, which all offerors submitted in early October. On the basis of price, the agency selected the Bimble site for award. After the selection of Bimble, but before the agency issued an official notification of award, the protester learned of MSHA's plans to move to the Bimble building and contacted the contracting officer. In a telephone conversation of October 22, with an Interproperty representative, the contracting officer confirmed the agency's plans, advising the protester of his efforts to advertise the procurement and declining to delay award to allow Interproperty to submit an offer. On October 22, 1998, the agency awarded the lease to Bimble, and Interproperty filed a protest with the agency and subsequently to our Office.

Interproperty contends that the SFO did not comply with the requirement for full and open competition because the agency denied Interproperty, the incumbent lessor, the opportunity to submit an offer. Interproperty further contends that the failure to solicit the protester was deliberate. The president of Interproperty asserts that, when the agency canceled the solicitation in 1997, he requested to be notified of future solicitations. Affidavit of Gregory Parsons, Nov. 25, 1997, at 2. His stepmother, who lives in Harlan County and who helps to manage the firm's existing leases, testifies to conversations with the contracting officer in July 1998, concerning repair work under another lease, in the course of which she specifically asked whether there were any SFO's pending and was told that there were none. Affidavit of Lanola Parsons, Nov. 25, 1997, at 1. She further states that during her conversation with the contracting officer on October 22, the contracting officer stated that he had deliberately avoided notifying Interproperty because he did not believe Interproperty's existing building would meet the requirement that the site

not be more than 300 feet from a main highway.¹ Id., at 2-3. The protester also asserts that with a long-term tenant on-hand, it had no reason to "scour" local newspapers to seek new leasing opportunities and did not see the advertisements. Protester's Comments, Jan. 6, 1999, at 2.

The contracting officer denies that he deliberately failed to provide Interproperty the opportunity to compete. Letter from Contracting Officer to Protester at 3 (Nov. 20, 1998). He did not recall Ms. Parsons asking about pending solicitations in July and notes that, as far as he was concerned, she was merely handling housekeeping issues and that he would not expect her to make such an inquiry on behalf of Interproperty. Further, agency counsel points out, at the time of the telephone conversation, the agency had already received initial proposals. Agency Comments on Hearing, Feb. 17, 1999, at 2, 3. The agency notes that it received five offers and made an award at a price substantially lower than that under the existing lease.² It did not, agency counsel argues, deny Interproperty the opportunity to compete; the protester simply did not respond to the newspaper advertisements and did not submit an offer.

The Competition in Contracting Act of 1984 requires contracting agencies to obtain full and open competition, and this is accomplished only where (1) all qualified vendors are allowed and encouraged to submit offers on federal procurements; and (2) a sufficient number of offers is received to ensure that the government's requirements are filled at the lowest possible cost. Cutter Lumber Prods., B-262223.2, Feb. 9, 1996, 96-1 CPD ¶ 57 at 2. Where the agency fails to solicit a successfully-performing incumbent, with the result that there is only a minimal level of competition, it does not meet its obligation of obtaining full and open competition. Professional Ambulance, Inc., B-248474, Sept. 1, 1992, 92-2 CPD ¶ 145 at 2-5. Similarly, we have sustained protests where the agency makes a deliberate or conscious attempt to preclude the protester from competing. Bosco Contracting, Inc., B-270366, Mar. 4, 1996, 96-1 CPD ¶140 at 3. The record here provides no basis for sustaining the protest.

Here, the agency followed its procedures for advertising this lease. The agency's regulations here, which establish the procedures for contracting for leasehold interests in real property, require only that leases for more than 10,000 square feet be publicized in local newspapers and may be posted on an on-line information system. 48 C.F.R. § 570.302 (1998). The agency maintains mailing lists for leases over 20,000 square feet at its Atlanta regional office; for smaller leases, such as the one here, the mailing list is composed of firms that respond to the initial newspaper

¹The parties now agree that the protester could have met this requirement in several ways, most easily by extending the existing parking lot. Comments at 2-3.

²\$10.98 per square foot versus the current \$12.24 per square foot.

notices. The agency advertised this lease in the local Barbourville newspaper and another newspaper which circulated in a broader area--northern Kentucky. There is no allegation that the agency's choice of newspapers was not appropriate for the agency's purpose--to apprise all responsible sources in the Barbourville area of the competition. The protester offers no explanation for its failure to see the advertisement, beyond its statement that, with a lease in place, it saw no reason to pursue other business.

We find no evidence that the contracting officer deliberately excluded the protester from competing. In order to resolve this allegation, our Office conducted a telephonic hearing during which the Interproperty representative and contracting officer testified.

The hearing confirmed that the Interproperty representative first spoke with the contracting officer in July 1998, about lease administration matters, after the agency had received initial offers for the lease here.³ Regarding telephone calls made to the contracting officer beginning on October 19, the contracting officer acknowledged that, upon returning from vacation, his first priority was to respond to calls and messages related to lease administration matters. He deferred matters related to ongoing procurements, including the notice of award to Bimble, until October 22, the date upon which he responded to Interproperty's telephone calls and upon which he sent the notice of award to Bimble, because "[it] took me almost a day and a half to get through the phone calls and the e-mail messages." He stated that he handles 110 leases in Kentucky and thus could not give Interproperty's phone calls priority because he "[was trying] to get lease administration issues ironed out." Transcript at 24. He further stated that the July phone calls involved other leases and, in view of the types of matters with which he was dealing with Ms. Parsons--concerns about heating and air conditioning and janitorial work--he did not believe Ms. Parsons to be representing Interproperty for pending procurements; in any event, he does not remember her asking about pending procurements, at any time, and denies that he stated he deliberately failed to solicit Interproperty. The testimony of the parties did not establish that the contracting officer deliberately failed to solicit Interproperty, and, in any event, these conversations occurred after the receipt of initial proposals, too late for submission of a proposal.

Based on this record, we cannot conclude that the contracting officer's failure to apprise Interproperty of the procurement was either deliberate or contrary to regulation. In the absence of conclusive evidence that the agency deliberately excluded Interproperty from the competition, and given that the agency received five offers and made an award at a price lower than the other competitors' prices, as well as that under the existing lease, we see no basis to conclude that the agency

³ These matters concerned another building that Interproperty leased to MSHA in Whitesburg, Kentucky.

did not meet its statutory obligation. Cutter Lumber Prods. B-262223.2, supra, at 3 (absent any evidence of a deliberate attempt to exclude the incumbent, the key considerations in determining whether absence of the incumbent resulted in a failure to obtain full and open competition are the number of competitors and the agency's ability to obtain a reasonable market price).

Interproperty also contends that Bimble's offer did not meet solicitation requirements, in that it is located outside the Barbourville city limits and violates the conflict of interest provision in the solicitation because an officer of Bimble is associated with a coal company. The record here shows that the agency did not strictly apply the SFO requirement for a location within the city limits, since MSHA had already determined that the Bimble location met its actual needs. Although the owner of the Bimble site previously had a mining permit, he did not engage in mining but in washing coal; the intervenor denies that he is involved in coal mining. In any event, since we have concluded that the failure to solicit Interproperty provides no basis for resolicitation, Interproperty, which did not submit a proposal, is not an interested party to challenge the acceptability of Bimble's proposal, given that there are other parties in line for award if we were to sustain the protest on the grounds that the agency should have rejected the Bimble proposal. Award to the offeror next in line, not resolicitation, would be the appropriate remedy. Continental Serv. Co., B-274531, Dec. 17, 1996, 97-1 CPD ¶ 9 at 8.

The protest is denied.

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